

MEMORANDUM

DATE: May 18, 2006

TO: Oil Spill Advisory Council

FROM: Federal Funding TAC

SUBJECT: Proposed Approach and Statement of Work

I. Composition of Federal Funding Technical Advisory Committee

The Committee is comprised of Phil Winberry, Council Member and Chair; Maura Brueger, Council Member; Kennie Endleman, Council Member; Eric Johnson, Washington Public Ports Association; and Thornton (Cholly) Mercer, Council Member. Also in attendance were Fred Felleman, WAVE; and Jacqui Brown Miller, Council Staff.

II. Committee's Charge

1. draft a scope of work for a study to examine federal spill activities that are required or authorized under law but are not being performed due to lack of funding;
2. identify spill prevention activities being performed by the state which the federal government could be, but is not undertaking, and which the federal government does not provide funds to the state to perform;
3. identify possible funding sources for spill activities performed by the State of Washington in lieu of the federal government; and
4. identify spill prevention gaps that exist as a result of United States v. Locke, et al, 529 U.S. 89 (2000) in which the U.S. Supreme Court ruled that the State of Washington cannot regulate oil tanker vessels because the federal government has preempted the field by enacting a comprehensive federal regulatory

scheme governing oil tankers. The Court did note that Washington might regulate its own ports and waterways so long as the rules are based on “the peculiarities of local waters” and do not conflict with federal regulation.

III. Committee’s Proposed Approach to Charge

A. Charge One

The scope of work will task the selected consultant to document the oil spill prevention activities currently authorized or mandated to be performed by the following federal agencies (including, but perhaps not limited to):

- US Coast Guard (“USCG”);
- US Fish and Wildlife Service;
- US Department of Transportation;
- Office of Pipeline Safety;
- US Minerals Management Service;
- Olympic Coast National Maritime Sanctuary;
- US National Parks Service;
- US Department of Homeland Security;
- US Department of the Interior;
- US Army Corps of Engineers;
- National Marine Fisheries Service; and the
- US Environmental Protection Agency.

The second task under this work section will require the consultant to identify specific oil spill prevention activities that, while statutorily or otherwise assigned to a particular federal government entity or agency, are not being performed. The consultant will address the funding source for the relevant activity (those being performed as well as those being ignored), *i.e.*, is the activity funded by Congress and, if so, is the funding adequate for the assigned task or is the agency not managing the task or applying available funds in an appropriate manner (for instance are funds being transferred or used for other agency activities such as homeland security?). The consultant will be asked to propose criteria against which the Council can measure whether the activities assigned to

the USCG and other federal agencies are being performed and how well they are being performed.

To facilitate, and perhaps ameliorate some of the costs associated with hiring a consultant, the TAC is undertaking to gather some of the relevant information in advance of the awarding any contract. Those include:

1. Developing list of statutory authorizations and administrative regulations that empower federal agencies to undertake oils spill prevention activities.
2. Obtaining GAO reports on USCG mandated activities, how the USCG prioritizes those activities and an assessment of performance. (Included will be a specific look at how homeland security has impacted USCG oil spill preventive activity performance.)
3. Identifying the universe of documents needed for the consultant to perform the analysis required to complete this charge.
4. Obtaining oil spill prevention performance measures (if any) developed by the State or federal government.
5. Identifying and quantifying federal government oil spill prevention program funding streams.

1. Issues for Council consideration

No funds exist in the current Council budget for this study. Preparing a scope of work statement and issuing a Request for Proposal does not seem to be appropriate in view of the fact we could not enter into a contract to have services performed. However, we are required to submit September reports to the Governor and Legislature detailing costs of a “best practices” oil spill prevention program (and response and remediation). How can the Council determine what the cost of such study might be for inclusion in reports to the Governor and Legislature without circulating a Request for Proposal when we have no intention of entering into a contract? Over the next 45 days the TAC, through the good offices of several of its members, can put together a relatively complete listing of the federal agencies involved and the answers to some of the issues detailed above, but that still leaves us without the critical analysis required to satisfy Charge One, nor does it

provide the necessary analysis of the amount of money needed in the next biennium to have a consultant complete the charge.

B. Charge Two

The consultant will also be tasked to identify spill prevention activities being performed by the State for which no funds are received from the federal government. Here too, in an effort to ameliorate the cost to the State, the TAC and staff will work with the Department of Ecology to obtain a complete list of Ecology's oil spill prevention activities and the source of authority for performing such activity. The TAC will also review the MOA currently in place between the USCG and Ecology. In addition, the TAC (or the consultant) will undertake an analysis of oil spill prevention activities currently being performed or tasked to other State agencies, either by statute or administrative regulation including the Departments of Fish and Wildlife, Natural Resources, Archaeology and Historic Preservation, Transportation, Health, the Washington State Patrol, Washington State Fire Marshall, Washington Military Department Emergency Management Division, Washington State Parks, Utilities and Transportation Commission, Puget Sound Action Team, and Northwest Straits Commission.

1. Issues for Council consideration

The issues for the Council to consider here are the same as those listed under Charge One, above.

B. Charge Three

The consultant will be asked to provide an exhaustive listing of possible funding sources for oil spill prevention (and response and remediation) activities necessary to ensure that Washington's navigable waters are protected by a "best practices" spill program.

1. Issues for Council consideration

The issues for the Council to consider here are the same as those listed under Charges One and Two, above.

C. Charge Four

The consultant will also be tasked to identify necessary oil spill prevention activities not being performed by any governmental entity, but that should be part of a ‘best practices’ oil spill prevention program.

The “best practices” oil spill prevention program that will be recommended by the Council to the Governor and Legislature may identify activities (gaps) not being performed by the State due to perceived preemption issues. (See U.S. v. Locke, *infra*). The consultants report generated under Charges One, Two and Three, above, should analyze such gaps and determine whether the state activity could fill the gap or whether federal preemption will bar the State from taking preventive or curative action. This particular charge cannot be undertaken until the Council makes its September reports to the Governor and the Legislature and Charges One, Two and Three, above are completed. It may be that this task should not be part of the consultant’s task, but rather an activity best performed by the Council legal counsel, a possible cost benefit to the State.

1. Issues for Council consideration

The Council and staff must decide who should perform work required under this charge.